Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1867

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

MARY L. GILLIES,

Petitioner,

v.

GEORGE DELOZIER, JR., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENTS GEORGE DELOZIER & GEORGE GIBSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS A. FARRINGTON, ESQUIRE
9200 Basil Court, #204
Landover, Maryland 20785
(301) 322-4000

EDWARD J. GORMAN, JR., ESQUIRE
GORMAN & CANFIELD
4701 Sangamore Road
Bethesda, Maryland 20816
(301) 229-7500

Counsel for Respondents Delozier & Gibson

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals properly rule that petitioner's claim under 42 U.S.C. § 1983 fails because she has not alleged a deprivation of a right protected by the Constitution or laws of the United States

II. Did the Court of Appeals properly rule that petitioner's claim under 42 U.S.C. § 1985 fails because she has not alleged any facts supporting her conclusory allegations that the defendants conspired to deprive her of the equal protection of the laws and equal privileges and immunities under the laws.

ADDITION TO THE LIST OF ALL PARTIES

THOMAS A. FARRINGTON, ESQUIRE
Counsel for Respondents,
Delozier & Gibson
9200 Basil Court, #204
Landover, Maryland 20785
(301) 322-4000

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED ...	i
ADDITION TO LIST OF ALL PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
COUNTER-STATEMENT OF THE CASE	1
ARGUMENT FOR DENYING THE WRIT	2
I. Personal Injury Allegedly Suffered As A Result Of A State Official's Negligence Does Not Amount To A Loss Of Liberty Under The Constitution Or Laws Of The United States	2
A. Personal Injury Allegedly Suffered As A Result Of A State Official's Simple Negligence Is Not Actionable Under 42 U.S.C. § 1983	2
B. The Grant of Certiorari In *Daniels v. Williams* Makes Certiorari In This Case Inappropriate .	4
II. Petitioner Has An Adequate Remedy At State Law Notwithstanding Maryland's Doctrine Of Sovereign Immunity	5
A. The Grant Of Certiorari In *Daniels v. Williams* Makes Certiorari In This Case Inappropriate .	5
B. Petitioner Has An Adequate Post Deprivation Remedy Under State Law Remedy Which Satisfies The Requirements Of Due Process	5
C. Maryland's Qualified Good Faith Immunity Defense Is Virtually The Same As The Good Faith Immunity Defense Available In § 1983 Actions	7
D. Acceptance Of Petitioner's Contentions Would Turn 42 U.S.C. § 1983 Into A Font Of Tort Law	8
III. Petitioner's Claim Under 42 U.S.C. § 1985 (3) Fails Because She Has Not Alleged Any Facts Supporting Her Conclusory Allegations That The Defendants Conspired To Deprive Her Of The Equal Protection Of The Laws And Equal Privileges And Immunities Under The Laws	10
CONCLUSION	11

TABLES OF AUTHORITIES

CASES: Page

Baker v. McCollum, 443 U.S. 137 (1979) 3

Boddie v. Connecticut., 401 U.S. 371 (1971) 6

Daniels v. Williams, 748 F.2d 229 (4th Cir. 1984) *cert. granted*, 469 U.S. ____ 1985) (No. 84-5872, 1984 Term) ..... *passim*

Estelle v. Gamble, 429 U.S. 97 (1976) 3

Ferri v. Ackerman, 444 U.S. 193 (1979) 6

Juncker v. Tinney, III, et al., 549 F.Supp. 574 (D.MD 1982) ..... *passim*

James v. Prince George's County, 288 Md. 315, 418 A.2d 1173 (1980) ..... *passim*

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 7

Martinez v. California, 444 U.S. 277 (1980) 3

Parratt v. Taylor, 451 U.S. 527 (1981) ..... *passim*

Paul v. Davis, 424 U.S., 693 (1976) 3, 4

Wood v. Strickland, 420 U.S. 308 (1975) 7, 8

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amend. XIV ..... *passim*

STATUTES

U.S.C. § 1983 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1867

MARY L. GILLIES,

Petitioner,

v.

GEORGE DELOZIER, JR., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENTS GEORGE DELOZIER & GEORGE GIBSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents George Delozier, Jr. and George Gibson respectfully request that this Court deny the petition for a writ of certiorari seeking a review of the opinion of the Court of Appeals for the Fourth Circuit in this case. That opinion is set forth at Pet. App. 16a-20a

COUNTER-STATEMENT OF THE CASE

The respondents Delozier and Gibson adopt the counter-statement of the case as set forth in the brief of respondents

S.L. Nusbaum & Co., Inc., and St. Mary's Square Merchants Association.

ARGUMENT FOR DENYING THE WRIT

I. Personal Injury Allegedly Suffered As A Result Of A State Official's Simple Negligence Does Not Amount To A Loss of Liberty Under The Constitution Or Laws Of The United States

A. Personal Injury Allegedly Suffered As A Result Of A State Official's Simple Negligence Is Not Actionable Under 42 U.S.C. § 1983

To maintain an action under 42 U.S.C. § 1983, two elements must be alleged. First, the conduct complained of must have been done by one acting under the color of state law; and second, said conduct must deprive the person of the rights, privileges or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981). It is true that the right not to be subjected to physical injury is a liberty interest. See *Juncker v. Tinney III et al.*, 549 F. Supp. 574, 576 (1982). The petitioner, however, has failed to allege deprivation of a liberty interest which is protected by the Constitution or laws of the United States.

The petitioner claims she sustained injuries as a result of the negligent failure of respondents Delozier and Gibson to prevent others from violating Maryland law. The petitioner also alleges that these respondents actively participated in that violation. The first element giving rise to a § 1983 action has been met. Delozier and Gibson are sheriffs who were acting in their official capacities at the time of the accident. However, the mere fact that the conduct of an individual acting under the color of State law results in injury does not necessarily amount to a deprivation of rights actionable under 42 U.S.C. § 1983. *Parratt v. Taylor, supra;*

Martinez v. California, 444 U.S. 277 (1980); *Baker v. McCollum*, 443 U.S. 137 (1979). To allege a deprivation of a liberty interest protected under the Fourteenth Amendment something more than mere negligence is required.

A constitutional deprivation "connotes an intentional act denying something to someone, or, at the very least, a deliberate decision not to act to prevent a loss." *Parratt*, 451 U.S. at 548 (Powell J. concurring). While the petitioner couches her claim in terms of a constitutional deprivation, the facts allege state only a claim for a common law tort. This Court has consistently rejected the notion that all common law torts committed by public officials acting under the color of state law automatically constitute violations of § 1983. *See Baker v. McCollum*, *supra*, *Estelle v. Gamble*, 429 U.S. 97 (1976); *Paul v. Davis*, 424 U.S. 693 (1976).

The proposition that mere negligence does not rise to the level of a constitutional deprivation of a liberty interest is illustrated by *Baker v. McCollum*, *supra*. In *Baker v. McCollum*, *supra*, the plaintiff had been in prison for eight (8) days after being arrested on a facially valid warrant. An action was brought under 42 U.S.C. § 1983 alleging a deprivation of a liberty interest without due process of law. The Court rejected the plaintiff's contention. It was pointed out that § 1983 does not impose liability for violations of the duty of care arising out of tort law.

In *Estelle v. Gamble*, *supra*, the Court held that medical malpractice does not become a constitutional violation simply because the victim is a prison inmate. The Court found that the mistreatment allegedly suffered by the complainant constituted nothing more than ordinary medical malpractice, which is actionable only under state law, and not under federal law. In order to state a cognizable claim under § 1983 for medical malpractice, the Court conclude that

"acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs would have to be alleged."

In *Paul v. Davis*, *supra*, the plaintiff brought suit for defamation against state officials who distributed a flyer which identified the plaintiff as an active shoplifter. The plaintiff urged that her claim was actionable under 42 U.S.C. § 1983. The Court rejected plaintiff's argument stating that the alleged injury to plaintiff's reputation did not involve a liberty interest invoking the Fourteenth Amendment simply because it was perpetrated by a public official. Indeed, the Court specifically stated that such a reading of the Fourteenth Amendment would make § 1983 "a font of tort law to be super imposed on whatever systems may already be administered by the states." *Paul*, 424 U.S. at 699, 701.

The foregoing cases indicate that something more than mere negligence is required before an injury caused by a person acting under color of state law rises to the level of a constitutional deprivation. The plaintiff here has suffered an injury which was the result of at most mere negligence. There has been no constitutional deprivation of liberty. The petitioner has a tort claim in state court and no cognizable claim under 42 U.S.C.§ 1983.

B. The Grant Of Certiorari In *Daniels V. Williams* Makes Certiorari In This Case Inappropriate

The petitioner contends that the issues she raises are substantively the same as those raised by Roy E. Daniels in his brief on the merits filed with this Court. *See Daniels v. Williams*, 748 F.2d 229 (4th cir. 1984) *cert granted*, 469 U.S. ____ (1985) (No. 84-5872, 1984 term). In so contending the petitioner gives this Court a reason to deny her petition for writ of certiorari.

The Court of Appeals for the Fourth Circuit in *Danield v. Williams, supra,* decided that personal injury allegedly resulting from the negligent act of a state official is not a protectable liberty interest under the due process clause of the Fourteenth Amendment. On the basis of that decision, the Court of Appeals for the Fourth Circuit affirmed the holding of the District Court in this case. As the petitioner here points out, the issues in *Daniels* and *Gillies* are identical. The issues raised by the petitioner in *Gillies* add nothing to the issues presently before the Court in *Daniels*. Consequently, this court's understanding of the issues presented in *Daniels* and its decision-making process will not be enhanced by what would be a necessarily duplicative, unproductive review of this case.

II. Petitioner Has An Adequate Remedy At State Law Notwithstanding Maryland's Doctrine of Sovereign Immunity

A. The Grant of Certiorari In *Daniels v. Williams* Makes Certiorari In This Case Inappropriate

The respondents Delozier and Gibson reiterate the views expressed above in paragraph I (B). Granting the petition in *Gillies* would add nothing to the issues presently before the Court in *Daniels*. Petitioner's writ, therefore, should be denied.

B. Petitioner Has An Adequate Post Deprivation Remedy Under State Law Which Satisfies The Requirements Of Due Process

An issue before the Court in *Daniels, supra,* is whether or not allegations of a negligent deprivation of a liberty interest state a claim under 42 U.S.C. § 1983. Even should the Court answer that question in the affirmative, petitioner's writ should still be denied on the basis of the Court's holding in *Parratt, supra.*

The Court in *Parratt, supra,* ruled that allegations of negligence by a state official amounted to a constitutional deprivation of a property interest. Even so, the plaintiff in *Parratt, supra,* still had no actionable claim under 42 U.S.C. § 1983, because there was no violation of the due process clause of the Fourteenth Amendment. The Court found that the plaintiff had an adequate remedy at state law to redress any loss suffered. Applying the Court's analysis in *Parratt, supra,* to this case, the issue before the Court becomes is whether or not the remedy available to the petitioner under state law satisfies the requirements of procedural due process.

All that is needed to satisfy due process standards is that petitioner be provided with "an opportunity granted at a meaningful time and in a meaningful manner for [a] hearing appropriate to the nature of the case". *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). Maryland provides the petitioner with such a hearing. Under Maryland law the petitioner has a common law tort action for negligence. Indeed, petitioner has filed a negligence action in the U.S. District Court for the District of Maryland.

The petitioner in her brief contends that the availability of the defense of sovereign immunity violates due process. This argument is untenable. By making this argument, the petitioner seems to equate "adequate remedy" with compensation. The availability of a remedy in state or federal court would be seriously affected if the respondents were to prevail on any affirmative defense. If the availability of the affirmative defenses of contributory negligence or assumption of the risk does not violate procedural due process, it is inconceivable that the defense of sovereign immunity should be treated any differently. See *Ferri v. Ackerman,* 444 U.S. 193, 198 (1979), *Juncker,* 549 F.Supp. at 580.

The availability of an affirmative defense to the respondents is irrelevant to the question before the Court. Just as with any other affirmative defense a plea of sovereign immunity might deprive the petitioner of a hearing on the merits. But a hearing on the merits is not required to satisfy due process in every case. *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 438 (1982). The petitioner has not been deprived of her right to present a claim or to be heard. Due process requires only that the petitioner be allowed to bring a claim in state court and be heard on the issue of sovereign immunity by a court with the power to fully compensate the petitioner for her loss. See *Parratt*, 451 U.S. at 544. The courts in Maryland afford petitioner that opportunity.

C. Maryland's Qualified Good-Faith Immunity Defense Is Virtually The Same As The Good Faith Immunity Defense Which Is Available In § 1983 Actions

Petitioner contends that the potential availability of Maryland's qualified sovereign immunity defense violates procedural due process. In so contending, the petitioner ignores the fact that a similar defense may be raised in § 1983 actions. Under both Maryland and Federal law, a defendant may raise good faith immunity as a defense if (1) he is a public official, *Wood v. Strickland*, 420 U.S. 308, 316 (1975), *James v. Prince George's County*, 288 Md. 315, 323-324, 418 A.2d 1173 (1980) and (2) he was performing a discretionary act, *Wood, supra*, 420 U.S. at 319, *James, supra*, 288 Md. at 323-324. And under both Maryland and Federal law the defendant is immune from liability only if he acted without malice. *Wood*, 420 U.S. at 322, *James*, 288 Md. at 323.

There is an additional requirement under federal law that the defendant may not have known or may not have had reason to know that his actions would violate plaintiff's

constitutional rights. *Wood*, 42 U.S. at 322. With this exception the defenses are identical. There is no principled reason to support the argument that the availability of the defense of sovereign immunity in state court should violate procedural due process, while the availability of virtually the same defense in Federal Court does not.

D. Allowing Petitioner to Prosecute A Claim Under 42 U.S.C. § 1983 Would Turn § 1983 Into a Font of Tort Law

This Court has expressed the view that the Fourteenth Amendment was not meant to be turned into a font of tort law. *Paul, supra.* In *Parratt, supra,* the Court expressly disavowed an interpretation of § 1983 which would result in a situation where "any party who is involved in nothing more than an automobile accident with the state official could allege a constitutional violation under § 1983." *Parratt*, 451 at 544. If the Court allows petitioner to proceed under § 1983, the concern expressed in *Parratt, supra,* would most certainly come to pass.

The petitioner contends that it is clear that the respondents will prevail on the defense of sovereign immunity. The petitioner intimates that it is unquestionable under Maryland law that the respondents were performing a discretionary act. Maryland law is not as clear on this point as the petitioner would have the Court believe.

A discretionary act is one in which the official has the freedom and authority to make decisions and choices. *James v. Prince George's County,* 288 Md. 315, 418 A.2d 1173, 1179 (1980). The mere fact, however, that some decisions are made in performing a particular task is not determinative of whether or not the fact is discretionary or ministerial. *James*, 418 A.2d at 1180. For example, under Maryland law the driving of an emergency vehicle is an ministerial act.

James, 418 A.2d at 1180. A driver of an emergency vehicle has a minimal amount of discretion as to how he drives in that he must drive with due regard for the safety for all persons. *James*, 418 A.2d at 1180. If driving an emergency vehicle is a ministerial act, it would not be far fetched to argue that directing pedestrian and vehicular traffic does not involve the degree of discretion necessary to afford respondents the defense of sovereign immunity.

Petitioner also seems to contend that in allegedly allowing others to violate Maryland law the respondents were performing a discretionary act. It is inconceivable to think that sheriffs charged with a duty of enforcing Maryland law have any discretion whatsoever in deciding whether or not to enforce those laws. The duty to enforce the law would seem to be one of the clearest examples of a ministerial act.

The distinction between a discretionary and ministerial act is not at all clear. In ruling on a motion to dismiss a federal court would have to rule on the merits of the defense. *Juncker*, 549 F.Supp. at 579. In deciding that question the court would have to make the same finding of facts as those required to dispose of the case on the merits. *Juncker*, 549 F.Supp. at 579. A holding by this Court which allows a claim to be brought under § 1983 each time there is a dispute over the applicability of the defense of sovereign immunity would open the flood gates. The result would be a situation that the Court expressly stated in *Parratt*, *supra*, it wants to avoid.

In addition, a determination that the respondents were acting in a ministerial capacity would prevent them from raising the defense of sovereign immunity. This finding would moot petitioner's contention that she has no adequate remedy at state law as petitioner's remedy in state court can be affected only if the respondents prevail on the defense of sovereign immunity. *Juncker* 549 F. Supp. at 579.

III. Petitioner's Claim Under 42 U.S.C. § 1985 (3) Fails Because She Has Not Alleged Any Facts Supporting Her Conclusory Allegations That The Defendants Conspired To Deprive Her Of The Equal Protection Of The Laws And Equal Privileges And Immunities Under The Laws

The respondents adopt the views expressed in the brief of respondents S.L. Nusbaum & Co., Inc., and St. Mary's Square Merchants Association.

CONCLUSION

The petitioner has not alleged a deprivation of a liberty interest which is actionable under 42 U.S.C. § 1983. Even if the petitioner has alleged the deprivation of a liberty interest which is protected by the Constitution and the laws of the United States, the State of Maryland provides a remedy for the alleged negligent act which meets the requirements imposed by procedural due process notwithstanding the potential use of the affirmative defense of sovereign immunity.

The Petition for Certiorari should be denied.

Respectfully submitted,

THOMAS A. FARRINGTON, ESQUIRE
9200 Basil Court, #204
Landover, Maryland 20785
(301) 322-4000

EDWARD J. GORMAN, JR., ESQUIRE
GORMAN & CANFIELD
4701 Sangamore Road
Bethesda, Maryland 20816
(301) 229-7500

Counsel for the Respondents
Delozier & Gibson